SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73–1772, 73–1776, 73–1790, 73–1825

SOUTHERN CALIFORNIA GAS COMPANY,
PACIFIC GAS AND ELECTRIC COMPANY,
SAN DIEGO GAS AND ELECTRIC COMPANY,
CITY OF WILLCOX, *et al.*,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent.

On Petitions for Writs of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS ARIZONA PUBLIC SERVICE COMPANY, SOUTHERN UNION GAS COMPANY, SOUTHWEST GAS CORPORATION AND TUCSON GAS & ELECTRIC COMPANY

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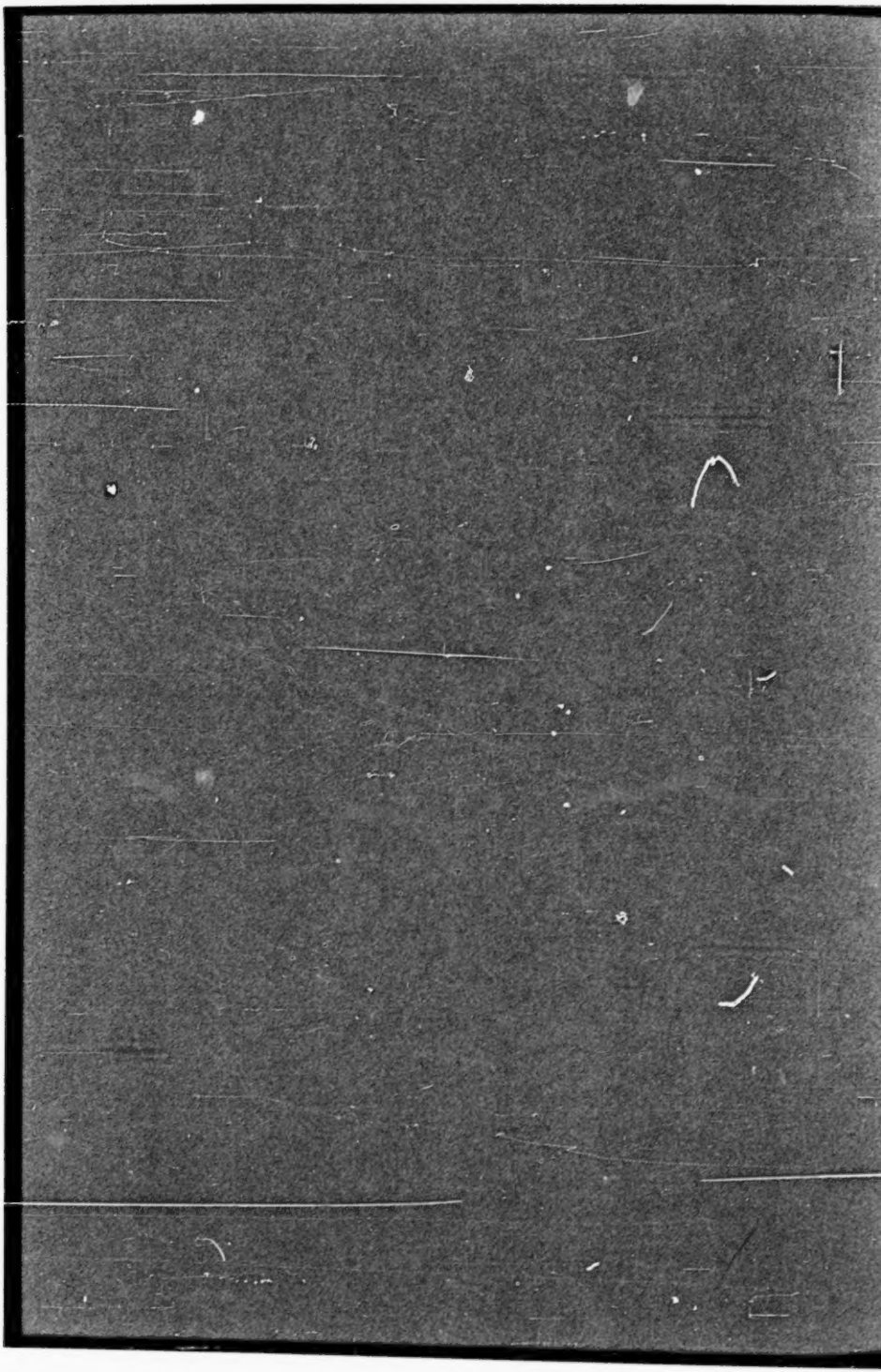

INDEX

Page

QUESTIONS PRESENTED 2

STATUTES INVOLVED 2

STATEMENT 3

REASONS FOR DENYING THE WRITS 9

I THE ISSUES RAISED ARE MOOT 10

II THE DECISION BELOW IS CLEARLY CORRECT 10

CONCLUSION 13

CITATIONS

CASES:

Atlanta Gas Light Co. v. *FPC* 476 F.2d 142 (5th Cir. 1973) 13

FPC v. *Louisiana Power & Light Co.*, 406 U. S. 621 (1972) 7, 10, 11

Granite City Steel Co. v. *FPC*, 320 F.2d 711 (D.C. Cir. 1963) 12

International Paper Co. v. *FPC*, 476 F.2d 121 (5th Cir. 1973) 13

STATUTES:

National Environmental Policy Act. 42 U.S.C. § 4321, *et seq* 13

Natural Gas Act, 15 U.S.C. § 717, *et seq*
Section 4(b), 15 U.S.C. § 717c(b) 2, 10,11, 12
Section 5(a), 15 U.S.C. § 717d(a) 2, 8, 11, 12

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Arizona Public Service Company, Southern Union Gas Company, Southwest Gas Corporation, and Tucson Gas & Electric Company, respondents herein and intervenors in the court below, oppose the captioned petitions for writs of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered on January 21, 1974, in the matter styled ***American Smelting and Refining Company, et al. v. Federal Power Commission.***

QUESTIONS PRESENTED

1. Whether the issues raised by interim emergency orders of the Federal Power Commission are moot by reason of the issuance of permanent orders superseding such?

2. Whether the Federal Power Commission's mandate under Sections 4(b) and 5(a) of the Natural Gas Act to proscribe undue discrimination in the curtailment of natural gas service is limited to protecting residential and commercial needs from preferential practices, or whether such obligation to insure non-discriminatory practices covers industrial needs as well?

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act, 15 USCA, §717, *et seq.* are Sections 4(b) and 5(a) which provide:

Section 4

* * * * * * *

"(b) No natural gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service." 15 USCA §717c(b)

Section 5

* * * * * * *

"(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas

distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: ***Provided, however***, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates." 15 USCA §717d(a)

STATEMENT

The instant matter involves orders of the Federal Power Commission (Commission) establishing interim emergency priorities and procedures to ration natural gas supplies on the Southern Division System of El Paso Natural Gas Company (El Paso), an interstate pipeline subject to the Commission's jurisdiction under the Natural Gas Act, ***supra***, pending the Commission's final decision upon the appropriate permanent prescription to govern curtailment of service. The controversy here involved concerns whether the Commission properly found that all customers served by El Paso should be curtailed in the same manner, or whether certain claimed contractual preferences should prevail.

Arizona Public Service Company, Southern Union Gas Company, Southwest Gas Corporation, and Tucson Gas &

Electric Company are natural gas distributors serving approximately 668,000 consumers throughout the so-called east-of-California region, consisting of west Texas, New Mexico, Arizona, and southern Nevada. El Paso's deliveries to the above-listed distributors pursuant to firm contracts constitute the sole source of natural gas available for resale to such consumers, except for certain quantities purchased by Southern Union Gas Company from other suppliers. In addition to such distributors' dependence upon El Paso for their resale requirements, Arizona Public Service Company and Tucson Gas & Electric Company are dependent upon El Paso's firm direct sale deliveries as their sole source of natural gas for their electric generation facilities, which provide electric energy to some 432,000 consumers.

The cast-of-California region, presently consisting of 30 resale distributor customers and 21 direct sale industrials served by El Paso, has received firm service for over four decades. Such service commenced in the early 1930's as El Paso extended its pipeline facilities westward from the natural gas production areas in west Texas through southern New Mexico and Arizona to a point of termination near Phoenix, Arizona (R. 22).

The east-of-California region's dependence upon El Paso's deliveries has developed as a result of both the geology native to the region and El Paso's particular marketing practices. First, the major portion of the east-of-California market served from El Paso's system contains no significant hydrocarbon formations for use either as a source of supply or as storage for volumes to be later withdrawn for peak period needs (R. 1905). Second, by reason of El Paso's early marketing practice, all large-volume industrial requirements in the east-of-California region were served solely on a direct sale basis (R. 1705-1706), with the local distributors thus left to serve residential and small commercial users. As a result, contrary to normal distribution operations wherein a distributor purchases approximately the same quantity from its supplier each day and meets the varying demands of its

temperature-sensitive residential and commercial requirements by interrupting service to its industrial users or withdrawing volumes from underground storage, the east-of-California distributors' purchases necessarily vary with the weather. In recognition of these patterns of service, El Paso has rendered firm service to the east-of-California distributors pursuant to contracts which provide for the satisfaction of their full requirements and do not require a minimum annual level of purchases.

More than 15 years after the above-described service to the region east-of-California was initiated, El Paso extended service to the state of California. Such service, commencing in 1947 to petitioner Southern California Gas Company, which in turn sells to petitioner San Diego Gas and Electric Company, and in 1950 to petitioner Pacific Gas and Electric Company, follows a pattern wholly different than that rendered to the east-of-California region. The two California companies desired that a fixed volume of gas be delivered each day of the year since, unlike the necessarily weather-dependent demands of the east-of-California distributors, the varying demands of their temperature-sensitive residential and commercial users could be met by (1) interrupting service to the large industrial loads in their distribution territories, (2) withdrawing gas stored in large underground reservoirs, and (3) increasing takes from their other sources of supply (R. 22-23; 1763-1764; 7065-7066).

Since the California distributors now purchase approximately 80% of El Paso's annual sales volumes, the extension of service to the California distributors necessarily involved a many-fold expansion of El Paso's previously-existing transmission facilities. The Financial feasibility of such mammoth expansion rested upon the California distributors' representation that they would purchase at approximately 100% of their maximum daily contract entitlement. Hence, the contracts and rate schedules executed for such service provided for (1) a penalty, in the form of a minimum annual bill, to insure that, if such purchases dropped below 91% of contract entitle-

ment, El Paso would nonetheless recover its costs and (2) a rate incentive, in the form of a discount constructed such that each unit above 91% of contract entitlement cost successively less than the preceding unit, to encourage such distributors to purchase 100% of contract entitlement. Pursuant to such rate form, the California distributors have paid a lower unit rate, despite the greater transmission mileage involved, than many of the east-of-California customers.

While the firm service rendered to the two regions was thus vastly different, El Paso's then-existing tariff provisions governing curtailment of service, although disputed by the California petitioners, properly provided for a ***pro rata*** apportionment of any and all curtailment to both California and east-of-California requirements. As specifically referenced in El Paso's Rate Schedule G under which the California companies receive service, Section 11.2 of El Paso's then-existing tariff provided that El Paso's sales to the two California distributors would be curtailed on the same end-use basis as all other deliveries (R. 9781; 12687-12690).[1]

While El Paso's then-existing tariff provided for the ***pro rata*** curtailment of both regions, such tariff purported to distinguish El Paso's liability for curtailing the east-of-California customers' firm contractual demands from that liability accruing from the curtailment of the California distributors. With respect to curtailments occasioned by depletion of supply, Section 9A thereof purported to exempt El Paso from liability to the east-of-California customers, while Section 9B provided that El Paso would not be so exempted from liability as respects the California distributors (R. 9778-9779).

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[1]Section 11.2 states that "in the sale and distribution of natural gas in the States of Arizona, New Mexico, Texas and San Juan County, Utah, . . .", certain procedures govern curtailment (R. 9781). El Paso's sales to the California customers are made in Arizona, and, hence, are covered by Section 11.2's terms. Similarly, Southwest Gas Corporation's distribution operations in Nevada fall within Section 11.2, since El Paso's sales to such company are effected within Arizona.

Except on infrequent occasions during the nearly four decades on full requirements service rendered to the east-of-California region and the 25 years of service to the state of California, El Paso never had the need to utilize the curtailment provisions of such tariff, nor was there any inquiry as to the justness and reasonableness of either the tariff's curtailment provisions or El Paso's interpretation thereof (R. 27). Until 1972, El Paso did not curtail any of its distributor customers, except for isolated ***force majeure*** instances ***Ibid.*** On infrequent occasions of extreme peak demand during such period when El Paso's supplies were not sufficient to satisfy all of its customers' requirements, El Paso did not follow the plain reading of its then-existing tariff providing for the ***pro rata*** curtailment of the industrial requirements served by all of its customers. Instead, evidently mindful that the east-of-California distributors served virtually no industrial loads and equally mindful of the liability that would be incurred if the California distributors were curtailed, El Paso levied such minor curtailments solely upon its direct sale customers (R. 28). The direct industrial customers assumed that curtailment was being implemented on a ***pro rata*** basis to the industrial loads served by distributors, as well, on such occasions, and, hence did not question whether such infrequent, small-volume curtailments were implemented in accordance with the relevant contract and tariff provisions (R. 1444-1445).

In 1971, El Paso's supply projections indicated that the first prolonged and substantial curtailments to be experienced by its system would commence on November 1, 1973, and continue on a daily basis thereafter (R. 28). Consistent with the Commission's Order No. 431,[2] El Paso filed proposed

[2] "In April 1971 the Federal Power Commission (FPC) promulgated its Order 431 requiring every jurisdictional pipeline to report to FPC whether curtailment of its deliveries to customers would be necessary because of inadequate supply of natural gas. A pipeline anticipating the necessity for curtailment was required to file a revised tariff to control deliveries to all customers – industrial 'direct sales' customers, purchasing gas for their own consumption, and 'resale' customers, purchasing gas for distribution to ultimate consumers." ***Federal Power Commission*** v. ***Louisiana Power & Light Co., infra,*** at 406 US 621, 623.

tariff modifications on July 6, 1971, incorporating new curtailment provisions to cope with such supply deficiencies (R. 11406). In support of its proposed tariff revisions, El Paso alleged that under its interpretation of the then-existing tariff provisions – an interpretation apparently fully cognizant of its liability under such tariff for failure to deliver to the California distributors – that the east-of-California customers alone would bear the full burden of the first substantial curtailment to be experienced on its system, and its proposed modifications would eliminate such disastrously discriminatory result.

On August 17, 1972, after the conclusion of lengthy hearings before an administrative law judge on the proposed tariff revisions, but prior to the issuance of an initial decision by the judge, El Paso informed the Commission that its latest supply forecasts revealed that curtailments in the magnitude of 250,000 Mcf on the average day would commence by November 1972, rather than November 1973, as originally projected (R. 11940). Moreover, El Paso informed the Commission that it was unwilling to incur the risk of liability which might flow from implementing, prior to a Commission determination as to the justness and reasonableness of such, either (1) its proposed tariff revisions or (2) its interpretation of the curtailment provisions of its then-existing tariff (R. 11933-11938). Accordingly, El Paso requested that the Commission exercise its emergency authority under Section 5(a) of the Natural Gas Act to provide interim procedures to govern the administration of curtailment pending decision upon the appropriate permanent program (R. 1938-1944).

On October 31, 1972, the Commission issued its Opinion No. 634 (R. 13355-13368). Such opinion found that El Paso's interpretation of its then-existing tariff provisions, which placed all of such curtailment on the east-of-California customers, was an obvious violation of the basic protection against discrimination afforded by the Natural Gas Act (R. 13362). Faced with the impending onslaught of curtailment, the Commission prescribed interim emergency priorities and procedures providing for the ratable curtailment of all service

rendered by El Paso according to an order of end-use priorities. Pursuant to such order, all large boiler fuel end-use requirements with alternate fuel facilities were to be curtailed first, thereafter small boiler fuel requirements and other industrial requirements were to be curtailed as necessary, with small commercial and residential requirements the last to be reached by curtailment (R. 13367).

After the Commission denied rehearing of such decision (R. 13747-13754), the California distributors and other parties initiated review proceedings in the U.S. Court of Appeals for the District of Columbia Circuit. The California petitioners' principal contention was that the Commission's jurisdiction over curtailment during the interim period was limited to insuring adequate service to the east-of-California residential and commercial users, but that such curtailment jurisdiction did not extend to correcting the discrimination between the two region's industrial users.

While remanding certain aspects of the interim emergency orders, the Court of Appeals upheld the Commission's determination that El Paso's interpretation of its then-existing tariff provisions would result in gross discrimination against end-users in the east-of-California region, and that, to the extent that such interpretation was properly based on El Paso's then-existing tariff and contracts, the Commission may override such contractual provisions with a plan based upon the ratable curtailment of all end-uses.

REASONS FOR DENYING THE WRITS

As shown below, the reasons for denying the writs are twofold: (1) the issues raised by the petitioners are, or will be shortly, moot, and (2) the decision below is clearly correct.

I

THE ISSUES RAISED ARE MOOT

On June 14, 1974, the Commission issued its Opinion No. 697 prescribing permanent curtailment priorities and procedures to supersede the interim emergency orders involved herein, to be effective "within 60 days after its issuance, or, in the event applications for rehearing are filed, upon the date of a final order on rehearing in this proceeding, whichever is the later." (Mimeo, p. 35). Assuming that the issues raised by the petitioners are worthy of this Court's attention, such issues should be assessed in the context of the Commission's fully considered decision as to the appropriate permanent curtailment procedures, rather than on the basis of stop-gap interim emergency orders which have been, or shortly will be, superseded. The petitions, therefore, should be denied.

II

THE DECISION BELOW IS CLEARLY CORRECT

The decision below represents a straightforward application of this Court's holding in ***Federal Power Commission v. Louisiana Power & Light Company***, 406 U.S. 621 (1972). ***LP&L*** found that the Commission has comprehensive and all-pervasive authority under its Section 1(b) transportation jurisdiction to fully regulate the conduct of curtailment of interstate natural gas service. This Court found, further, that such plenary authority to prescribe uniform curtailment priorities and procedures is not fettered by contractual curtailment provisions negotiated by private parties, but is exercised according to public interest standards, 406 U.S. 621, 642-643:

> "The substantive standard governing FPC evaluation of curtailment plans is found in § 4(b) of the Act:

> 'No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.' 15 USC §717c."

LP&L further found that the substantially similar provisions of Section 5(a), under which the instant controversy arises, provides a second procedural mechanism to enforce the Natural Gas Act's sanctions against preference, ***Ibid.*** Thus constituted, "[t]he Natural Gas Act of 1938 granted FPC broad powers 'to protect consumers against exploitation at the hands of natural gas companies.' "

The controversy involved herein provides a classic demonstration of why Sections 4(b) and 5(a) provide the standard for curtailments rather than agreements between private parties. By conferring on El Paso's interpretation of its previously-existing tariffs the status of express contract provisions, the California distributors contend that they have obtained from El Paso a "contract right" to exemption from curtailment, while the east-of-California purchasers have not obtained such "contract right". The California petitioners concede, however, that to exempt all service to California from curtailment while curtailing residential and commercial requirements east-of-California would be grossly discriminatory. But such California distributors see no discrimination in an allegedly contract-based curtailment program which would curtail ***all*** industries dependent upon natural gas in the east-of-California region prior to curtailing ***any*** industrial service rendered to the California distributors. Thus, although El Paso commenced full requirements service to the east-of-California region some 15 years before commencing service to California, two of the largest utilities

in the United States are here seriously suggesting that their private party agreements purchased an exemption from curtailment, thereby demoting the antecedent full requirements service to the east-of-California region to a curtailment status subservient to their own. No greater example could be found of the economic bludgeoning that the public interest provisions of Sections 4(b) and 5(a) were designed to prevent.

The short answer to the California petitioners' claim of preference is that Sections 4(b) and 5(a) prohibit preferential or discriminatory practices irrespective of whether the service involved is for residential, commercial, or industrial purposes. There is nothing within the plain terms of such Sections, the legislative history thereof, or this Court's holding in ***LP&L*** to suggest that the Commission's mandate "to protect consumers against exploitation" does not apply equally to all classes of service. See ***Granite City Steel Co.*** v. ***Federal Power Commission***, 320 F.2d 711 (1963).

In recognition, perhaps, that the sanctions against undue preference or discrimination apply equally to service rendered to industrial requirements, the California petitioners assert that, if discriminatory, their claimed contractual right of exemption is not unduly so. In support of such contention, the California distributors point to the provisions for a minimum annual bill and for a rate incentive in the rate schedule under which El Paso renders their service, and assert that such provisions are obligations not assumed by the east-of-California parties. Such "obligations", however, do not justify exemption from curtailment. The minimum annual bill is a provision commonly assumed by virtually all interstate pipelines' major customers in order to assure the financibility of major expansions of facilities. Since the financial feasibility of the enormous expansion of El Paso's system was based on the assumption that the two new customers would purchase 80% of such dramatically expanded annual throughput, it is hardly unreasonable that a condition for financing such

expansion would include the assumption of a minimum annual bill by such distributors. As for the rate incentive, such "obligation" has historically enabled the California distributors to purchase from El Paso at a lower unit price than that paid by distributors in Arizona. Hence, neither of such items can be seriously claimed as burdensome obligations, much less as justification for the extraordinary preference claimed.

In sum, the decision below properly upheld the Commission's determination that all customers served by El Paso had the expectation of firm service, and that the consequence of the failure of El Paso's supplies must be apportioned ratably to the end-use requirements served by all customers of El Paso. Since such decision is based on the plain terms of the Natural Gas Act and this Court's interpretation thereof, the decision below is clearly correct.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

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[3]Petitioners, Pacific Gas and Electric Company and San Diego Gas and Electric Company, raise subsidiary issues relating to (1) a claimed conflict between the decision below and the Fifth Circuit's decision in *International Paper Company* v. *Federal Power Commission*, 476 F.2d 121 (1973), and (2) a claimed violation of the National Environmental Policy Act (NEPA), 42 U.S.C. 4321, *et seq.* In both instances, the Court below fully discussed and properly dismissed such arguments as make-weight.

First, there clearly exists no conflict between the decision below and the Fifth Circuit's decision in *International Paper*, as is set forth in detail in the decision below (Appendix A to the petition of Pacific Gas and Electric Company, pp. 18-19). The Fifth Circuit expressly acknowledged the Commission's plenary authority to override contractually based curtailment provisions upon a showing that such

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provisions were discriminatory. What *International Paper* did contest was a matter falling outside of the Commission's curtailment jurisdiction; i.e., "whether or not an FPC curtailment order alone will serve to insulate a pipeline unable to meet contractual commitments from liability for this failure." 476 F.2d 121, 123. It was solely with respect to " '*damages* in the public interest', not '*curtailment* in the public interest' " that the Fifth Circuit held a finding of unequivocal public necessity to be a prerequisite for the abrogation of contractual provisions. 476 F.2d 121, 129, (emphasis in original).

Second, with respect to the claimed violation of NEPA, the decision below correctly found that the Commission's obligation to comply "to the fullest extent possible" with NEPA's procedural obligations, means compliance unless such compliance would give rise to a violation of the Commission's statutory obligations (Appendix A to the petition of Pacific Gas and Electric Company, pp. 47-48). In

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this instance, the Court below properly held that the Commission, in the very compressed time span between hearing and decision, had a clear statutory duty to take effective interim action to prevent gross discrimination among customers. Hence, such statutory conflict properly excused compliance with NEPA's procedural requirements until the issuance of the permanent plan. (See: ***Atlantic Gas Light Company*** v. ***FPC***, 476 F.2d 142 (5th Cir. 1973).